IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1368 OF 2006
IN
APPEAL NO. 245 OF 2006
IN
SUIT NO. 1414 OF 1979

1. M/s. New Era Fabrics P.L. & Anr.] .. Appellants (Ori.Def.1 & 2)

Versus

1. Nandkishor Lalbhai Mehta & Anr.] .. Respondents (Ori.Pltff. & D3)

Mr. M.M. Vashi with Mr. Sean Wassoodew for the applicants - appellants.

Mr. H.J. Thakkar, senior counsel with Ms. Mamata Saadh and Mr. Faizal Sayyed i/b M/s. M.K. Ambalal & Co. for the respondent No.1.

CORAM: R.M. LODHA &
S.A. BOBDE, JJ.

DATED: 19TH SEPTEMBER, 2006

P.C. :

. The appellants are original defendants No.1 and 2. The respondent No.1 is the original plaintiff and the respondent No.2 is the original defendant No.3. The Appeal is at the instance of the original defendants No.1 and 2 aggrieved by the judgment and decree dated 12th December, 2005, whereby the trial Judge decreed plaintiff’s suit thus:

"The Plaintiff’s suit is decreed in terms of

> prayer (a). it is directed that the defendants shall apply to the concerned authorities for getting permission under the provisions of Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act, as also for getting permission for conversion of industrial/commercial use to the residential use of the suit property within eight weeks from today. In the event, the permission as stated above is not granted by either of the Authorities, there shall be a decree in terms of prayer clause b(i) to b(v), as observed above.
>
> The defendants shall also pay the Plaintiffs costs.
>
> In case the decree in terms of prayer clause (b) takes effect, the amount deposited by the defendants in Court along with the interest shall be adjusted towards the amount due to the Plaintiffs."

2. This Notice of Motion has been taken out by the appellants praying therein that during the pendency of the Appeal the operation of the impugned judgment and decree be stayed.

3. We heard the counsel for the appellants and the senior counsel for respondent No.1.

4. Along with the Affidavit in support of the Notice of Motion, the appellants have placed on record the copies of the communication received from Municipal Corporation of Greater Mumbai, the Additional Collector, ULC, Greater Mumbai and the Commissioner of Labour.

5. It would be seen that by the impugned decree the learned Trial Judge directed the present appellants (original defendants No.1 and 2) to apply to the concerned authorities for getting permission under the provisions of Section 22 and 27 of the Urban Land (Ceiling & Regulation) Act as also for getting permission for conversion from industrial/commercial use to the residential use of the subject property within eight weeks therefrom while decreeing plaintiff's suit in terms of prayer clause (a). It was further held by the trial Judge that in the event the permission is not granted by either of the authorities, there shall be decree in terms of prayer clauses b(i) to (v) and in that event, the amount deposited by the defendants in the Court along with the interest shall be adjusted towards the amount due to the plaintiffs.

6. At this stage we deem it proper to quote prayer clauses (a) and (b) of the Plaint.That read thus:

> "(a) that the Defendants be ordered and decreed and directed specifically perform and carry out the said agreement for sale and to execute a conveyance of the said property in favour of the Plaintiff and to hand over vacant possession thereof to the Plaintiff and to do all other acts, things and deeds

and/or to execute all the documents, papers etc. as may be necessary for the purpose; and/or to duly convey the said property to the Plaintiff and/or to his nominees or nominee;

(b) that in the alternative to prayer (a) above and in the event of this Hon'ble Court not granting specific performance of the said agreement for sale:-

(i) for a declaration that the said sum of Rs.12,67,100/- as per particulars Exhibit "B" hereto with interest on the said sum of Rs.11,50,000/- at the rate of 18% per annum from the date of the suit is due and payable by the Defendants to the Plaintiff as and by way of refund of earnest moneys paid by the Plaintiff to the Defendants and interest and costs and that the Defendants be ordered and decreed to pay the same;

(ii) For a declaration that the repayment of the said amount with further interest thereon as mentioned in prayer (b)(i) above is secured by a charge on the said property and/or hypothecation of the said machineries, in favour of the Plaintiff;

(iii) That in default of payment of the amounts mentioned in prayer (b)(i) above within such time as may be fixed by this Hon'ble Court in that behalf and/or otherwise the said property and the said hypothecated machineries be sold by and under the decree, orders and directions of this Hon'ble Court and the net sale proceeds thereof be applied in or towards satisfaction of the Plaintiff's claims under prayer (b)(i) above;

(iv) that in the event of the net sale proceeds proving insufficient to satisfy in full the Plaintiff's claim under prayer (b)(i) above, liberty be reserved to the Plaintiff to apply for a personal decree against the Defendants for the balance as the case may be;

(v) that the Defendants be ordered and decreed to pay to the Plaintiff the said sum of Rs.78,06,600/- as per particulars Exhibit

> "F" hereto or such other sum as this Hon'ble Court may deem just and proper with interest thereon at the rate of 6% per annum or at such other rate as this Hon'ble Court may deem fit and proper from the date of the suit till payment or realization as and by way of loss and damages for breaches of the said agreement for sale;"

7. It appears that pursuant to the decree dated 12th December, 2005, the present appellants (defendants No.1 and 2) applied to the Municipal Corporation of Greater Mumbai for change of user from existing industrial zone (IZ) to residential user for the subject property. However, on 28th February, 2006 the petitioner was informed by the concerned authority of the Municipal Corporation of Greater Mumbai that their request for change of user cannot be considered. The communication dated 28th February, 2006 sent by Municipal Corporation to the appellants read thus:

> "1. That the specific clearance and NOC from Labour Commissioner for closure of the existing industry is not available.
>
> 2. That the office of the DIR of Ind. has not given permission for closure of existing industry.
>
> 3. That the applicants names are not reflected in the P.R. Card.
>
> 4. That the specific NOC from the Lessor is not submitted."

8. As a matter of fact, the appellants applied to the Commissioner of Labour under Section 25-O(1) of the Industrial Disputes Act, 1947 on 3rd February, 2006 seeking permission for closure of its industrial establishment situate in the subject plot. The Commissioner of Labour by its order dated 2nd march, 2006 rejected the said application on 2nd March, 2006. The operative order reads thus:

> "The Application dt. 3.2.2006 filed by M/s. New Era Fabrics Ltd., New Mogal Lane, Matunga (W), Mumbai-400016 under Section 25-O(1) of the Industrial Disputes Act, 1947, seeking permission for closure of its industrial establishment situated at the above mentioned address is hereby rejected under Section 25-O(2) of the said Act."

9. The appellants also made application to the Additional Collector, ULC under Section 22 of the Urban Land (Ceiling and Regulation) Act, 1976 for redevelopment of the property on 28th February, 2006. The said application came to be rejected by the Additional Collector, ULC, Greater Mumbai on 6th March, 2006.

10. It is thus clear that insofar as appellants (defendants No.1 and 2) are concerned, they made application to the concerned authorities as directed in the impugned judgment and decree seeking permission for

conversion of industrial/commercial use to the residential use of the subject property, but the said applications have been rejected and permission not granted. The impugned judgment and decree itself records that if such permission is not granted by either of the authorities, the plaint shall stand decreed in terms of clause b(i) to b(v) which is substantially in the nature of money decree in the sum of Rs.78,06,600/-. We are, thus, satisfied that operation of the impugned judgment and decree may be stayed on the appellants furnishing Bank Guarantee in the sum of Rs.66,56,600/-.

11. We, accordingly, pass the following order:

> (i) The appellants shall furnish Bank Guarantee in the sum of Rs.66,56,600/- from any Nationalised Bank to the satisfaction of the Prothonotary & Senior Master to remain operative until the disposal of the Appeal, within a period of two months' from today.
>
> (ii) Subject to the compliance of the aforesaid condition, the execution of the impugned judgment and decree shall remain stayed.

(iii) We clarify that in case the appellants fail to furnish Bank Guarantee as directed above within time, the respondent (original plaintiff-decree holder) shall be entitled to execute the decree in terms of prayer clause b(i) to (v)."

. Notice of Motion stands disposed of accordingly.

Sd/-
[R.M. LODHA, J.]

Sd/-
[S.A. BOBDE, J.]